Filed 12/8/16 Navarro v. Ocwen Loan Servicing CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FERNANDO NAVARRO, Plaintiff and Appellant, v. OCWEN LOAN SERVICING, LLC et al., Defendants and Respondents.	A147111 (Contra Costa County Super. Ct. No. MSC14-02018)

Plaintiff Fernando Navarro purchased a home in 2006 subject to a deed of trust. In 2009, after he defaulted on his loan, he attempted to get a loan modification from the loan's servicer, defendant Ocwen Loan Servicing, LLC (Ocwen), but no permanent modification agreement was ever reached. Navarro eventually filed for chapter 13 bankruptcy, triggering an automatic stay of claims against him, and the bankruptcy court approved his plan in 2011.

Three years later, after the bankruptcy court lifted the automatic stay, Navarro filed this action against Ocwen and other entities alleging numerous causes of action based on his failure to procure a loan modification and alleged irregularities involving the deed of trust. The trial court granted defendants' demurrer to the complaint on the basis that Navarro failed to disclose his claims in the bankruptcy proceeding, and it then dismissed the case with prejudice. We affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

We begin by summarizing the facts, and in doing so we accept as true all factual allegations of the operative complaint and " ' "consider matters which may be judicially noticed." ' " (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.) In 2006, Navarro obtained a $528,000 loan secured by a deed of trust recorded against his property in Antioch. The deed of trust identifies defendant Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary. Navarro eventually "found himself unable to keep up with the [mortgage] payments," and in early 2009, a notice of default was recorded on behalf of MERS claiming that Navarro was behind in his payments by $10,862.56. That September, MERS recorded an assignment of the deed of trust to defendant HSBC Bank USA, N.A. as Trustee for the Registered Holders of First NLC Trust 2007-1 Mortgage-Backed Certificates, Series 2007-1 (HSBC).

Meanwhile, in May 2009, Navarro applied for a loan modification from Ocwen, the loan's servicer. Ocwen later provided him with a "trial modification plan" (the first trial plan) calling for him to make reduced payments on a certain schedule. According to the complaint, "[a]uthorized representatives of [Ocwen] verbally told . . . [Navarro] that the [t]rial [p]lan would become permanent if [he] made the three payments, timely, and provided the documents requested by [Ocwen]."

Although Navarro "faithfully performed all of the terms" of the first trial plan, Ocwen refused to accept the modified payments or grant a permanent modification. In March 2010, he filed a voluntary petition for chapter 13 bankruptcy "in order to keep his home."[1] The following month, after the original bankruptcy was terminated, he filed a

[1] Whereas debtors who file for chapter 7 bankruptcy can discharge unpaid debts but cannot keep their homes if they discharge an unpaid home loan, "chapter 13 . . . allows a homeowner in default to reinstate the original loan payments, pay the arrearages over time, avoid foreclosure, and retain the home." (*Aceves v. U.S. Bank N.A.* (2011) 192 Cal.App.4th 218, 223.)

second chapter 13 petition. The second bankruptcy was soon terminated as well, and Navarro filed his third and final chapter 13 petition in June 2010. In July, he filed his bankruptcy schedules and disclosed the loan at issue here, indicating it was undisputed. On his personal property schedule, which requires disclosure of "contingent and unliquidated claims of every nature, including . . . counterclaims of the debtor . . . and rights to setoff claims," Navarro did not list any claims or right to a setoff against any creditor.

In October 2010, after Navarro again sought a loan modification, Ocwen notified him that he was approved for another trial plan (the second trial plan). This plan again required Navarro to make three modified payments, beginning in December 2010. After the deadline to make the first payment had passed, Navarro sought approval in the bankruptcy proceeding to enter the second trial plan, which the bankruptcy court soon granted. Navarro made some payments, but Ocwen refused to make the loan modification permanent and told him to continue making payments under the second trial plan.

The bankruptcy court approved Navarro's bankruptcy plan in the spring of 2011. Three years later, in April 2014, the bankruptcy court granted HSBC's unopposed motion for relief from the automatic stay that took effect when Navarro filed his bankruptcy petition. (See 11 U.S.C. §§ 301, 362(a).) It is undisputed that Navarro never disclosed to the bankruptcy court any of the claims he has alleged here.

Navarro filed this lawsuit in late 2014 and the operative complaint the following June.[2] The complaint asserts nine causes of action against HSBC[3] and Ocwen: intentional misrepresentation, false promise, negligent misrepresentation, breach of contract, promissory estoppel, breach of the implied covenant of good faith and fair dealing, negligence, wrongful foreclosure, and conversion. It also asserts a tenth cause of

[2] Navarro claims in his briefing that a second notice of default was recorded in December 2014, but he does not provide any supporting citation to the record. Nothing before us indicates that his property has been sold.

[3] HSBC and the First NLC Trust 2007-1 Mortgage-Backed Certificates, Series 2007-1 were erroneously sued as two separate entities.

action, unfair business practices, against these defendants and MERS. Most of the claims are based on Ocwen's alleged actions in relation to Navarro's attempts to get a loan modification, and the remainder are based on allegations that the assignment of the deed of trust to HSBC was void. Defendants demurred to the complaint on several grounds, including that Navarro failed to disclose his claims in the bankruptcy proceeding. Defendants also requested judicial notice of documents filed in that proceeding.

The trial court granted the request for judicial notice, which Navarro did not oppose. It then sustained the demurrer with prejudice and dismissed the case. In addition to finding that Navarro had failed to sufficiently plead various elements of the individual causes of action, the court found that most of his claims were time-barred and that all were subject to dismissal because he had not disclosed them to the bankruptcy court.

II.
DISCUSSION

Navarro contends that the trial court erred in sustaining the demurrer to his complaint based on his failure to disclose his claims in his bankruptcy schedules, because he "derived no benefit from the nondisclosure of the claims and it was not possible for him to have realized the wrongfulness of [d]efendants' conduct" until he consulted an attorney in 2014. We disagree, and we therefore need not address his other arguments for reversal.[4]

We independently review a dismissal after a demurrer is sustained. (*Brown v. Deutsche Bank National Trust Co.*, *supra*, 247 Cal.App.4th at p. 279.) "In doing so, this court's only task is to determine whether the complaint states a cause of action." (*Ibid.*) "We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions[,] or conclusions of law." (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "We also

[4] Navarro does not claim that the trial court abused its discretion by dismissing the complaint with prejudice, and we therefore need not address whether there is a reasonable probability that he could amend the complaint to cure the pleading defect. (See *Brown v. Deutsche Bank National Trust Co.* (2016) 247 Cal.App.4th 275, 279 (*Brown*).)

consider matters that may be judicially noticed, and a ' " 'complaint otherwise good on its face is subject to demurrer when facts judicially noticed render it defective.' " ' " (*Brown*, at p. 279.)

Our independent review leads us to conclude that the trial court properly sustained the demurrer because principles of estoppel bar Navarro from asserting his claims since they were not disclosed in the bankruptcy proceeding. The governing rule was established in *Oneida Motor Freight, Inc. v. United Jersey Bank* (3d Cir. 1988) 848 F.2d 414, and the rule has become known as the *Oneida Motor Freight* rule. The court held that a chapter 11 debtor is estopped from subsequently litigating a claim against a secured creditor when the debtor never disclosed the claim in the bankruptcy proceeding. (*Id.* at p. 415.) The court explained that a debtor has a "duty to schedule, for the benefit of creditors, all his [or her] interests and property rights" and an "express obligation of candid disclosure," both of which require the disclosure of "any litigation likely to arise in a non-bankruptcy contest. [Citation.] The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions." (*Id.* at pp. 416-417.) Such a failure can also trigger application of the doctrine of judicial estoppel, which "applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." (*Id.* at p. 419.)

The *Oneida Motor Freight* rule has been recognized by a California court to preclude attempts to subsequently litigate claims not disclosed in a chapter 13 bankruptcy proceeding. (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1605, 1609-1610 (*Hamilton*).) In *Hamilton*, the married plaintiffs sued the holder of their mortgage loan alleging claims "for breach of contract, fraud[,] and statutory violations in connection with the lender's foreclosure of the . . . loan." (*Id.* at p. 1605.) After the plaintiffs defaulted on the loan, the husband filed a voluntary petition for chapter 13 bankruptcy, as Navarro did here, recognizing the lender's secured claim but failing to disclose any counterclaims or rights to a setoff. (*Id.* at pp. 1606-1607.) The bankruptcy

court confirmed a plan that called for payments to the lender, but it lifted the automatic stay after the plaintiffs again defaulted, and they then sued the lender. (*Id.* at p. 1607.)

Hamilton affirmed the trial court's sustaining of the lender's demurrer, holding that "[t]here [was] nothing . . . to take the case outside the *Oneida Motor Freight* rule . . . 'that in completing bankruptcy schedules, a debtor should list any legal claims against a creditor whose wrongful conduct caused the bankruptcy; otherwise, an action on the claim is barred.' " (*Hamilton*, *supra*, 195 Cal.App.4th at pp. 1605, 1613-1614, quoting *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 136.) The events giving rise to the complaint had "occurred many months before [the husband] filed his bankruptcy proceeding, so he must have known of the facts allegedly justifying the claim, yet he failed to disclose the claim." (*Hamilton*, at p. 1613.) In addition, there was a basis to "infer[] that the debtor deliberately asserted inconsistent positions to gain advantage," as generally required to apply judicial estoppel, because the husband *had* disclosed the loan as a liability. (*Id.* at p. 1611 [distinguishing *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.* (3d Cir. 1996) 81 F.3d 355]; see *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1019-1020.)

We could conclude that Navarro forfeited his argument as to why the *Oneida Freight* rule should not bar his claims. "When an appellant asserts a point but fails to support it with reasoned argument and citations to authority, we treat the point as forfeited. [Citation.] . . .[W]e need address only the points adequately raised by [the appellant] in [the] opening brief on appeal." (*Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.) Navarro's bankruptcy-related argument comprises only one page of his opening brief and does not include citations to any authority in support of his points. Although his reply brief's argument on the same issue is more developed factually, it too primarily consists of conclusory assertions unsupported by any authority.

We will nevertheless consider the merits of the issue in the interest of justice. Navarro claims that the *Oneida Motor Freight* rule requires disclosure of only those claims that "were reasonably known at the time the [bankruptcy] schedules were filed." He contends that "it was not possible for him to have realized the wrongfulness of

[d]efendants' conduct" until he met with an attorney in 2014. We find *Hamilton*, which Navarro makes no attempt to distinguish despite the trial court's reliance on it, to be directly on point.[5] *Hamilton* makes clear that the application of the *Oneida Motor Freight* rule requires only that a plaintiff be aware of the *facts* underlying claims, not the legal basis for those claims. (*Hamilton*, *supra*, 195 Cal.App.4th at p. 1614; *Gottlieb v. Kest*, *supra*, 141 Cal.App.4th at p. 133.) Here, as in *Hamilton*, the facts giving rise to the claims occurred well before the bankruptcy filing. Navarro's complaint expressly ties the bankruptcy to not obtaining a permanent loan modification. (See *Hamilton*, at p. 1614.) Navarro's insistence now that he did not realize that those facts gave rise to claims until he consulted with an attorney is simply insufficient.

Navarro also argues that he should not be barred from litigating his claims because he "derived no benefit from the[ir] nondisclosure" in the bankruptcy proceeding. According to him, "it would have been more to [his] benefit to list the claims, as the rule of thumb is to have parties lose claims they do not list." This argument is circular and nonsensical. Navarro cannot avoid the application of the *Oneida Motor Freight* rule by saying that he did not benefit from failing to disclose his claims because the rule would normally bar them. And, in any event, he did have something to gain by not disclosing the claims: "a financial motive to secret assets exists under [c]hapter 13 . . . because the hiding of assets affects the amount to be discounted and repaid." (*De Leon v. Comcar Indus.* (11th Cir. 2003) 321 F.3d 1289, 1291.) In sum, he fails to convince us that the *Oneida Motor Freight* rule, as applied in *Hamilton*, *supra*, 195 Cal.App.4th 1602, does not bar his claims.

---

[5] *Hamilton* emphasized that the defendant lender was a party to the bankruptcy proceeding in distinguishing other cases which had held that judicial estoppel was not warranted. (See *Hamilton*, *supra*, 195 Cal.App.4th at pp. 1612-1613.) We are not aware of any participation by MERS in the bankruptcy proceeding here, but Navarro does not contend that any distinction should be drawn between MERS and the other defendants in determining whether the *Oneida Motor Freight* rule applies.

III.
DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

_____

Humes, P.J.

We concur:

_____

Margulies, J.

_____

Dondero, J.

Navarro v. Ocwen Loan Servicing, LLC et al. (A147111)